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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 Dinan & Company LLC,

10 Plaintiff,

11 v.

12 Deaconess Associations Incorporated,

13 Defendant.  
14

No. CV-21-01807-PHX-SMB

**ORDER**

15 Pending before the Court is Defendant Deaconess Associations Incorporated's  
16 ("Deaconess") Motion to Dismiss for Lack of Personal Jurisdiction, (Doc. 15 ("MDT")),  
17 and its Memorandum in Support of that MTD, (Doc. 16). The MTD is full briefed. (*See*  
18 Docs. 17; 18.) Neither party requested oral argument, and the Court elects to resolve the  
19 MTD without it. *See* LRCiv 7.2(f). Having reviewed the parties' briefing and relevant  
20 caselaw, the Court will transfer this action to the Southern District of Ohio for the reasons  
21 explained below.

22 **I. Background**

23 The impetus for this case is a May 9, 2014 agreement (the "Agreement") between  
24 Plaintiff Dinan & Company LLC ("Dinan") and Deaconess. (*See* Doc. 1-3 at 4 ¶ 7.) Dinan  
25 is a "business finder," meaning that it identifies merger and acquisition targets for its clients  
26 to purchase. (*Id.* ¶ 6.) Dinan agreed to identify and present different acquisition targets  
27 for Deaconess and—if Deaconess successfully acquired a company presented by Dinan—  
28 Deaconess would pay Dinan a contingency fee. (*Id.* ¶¶ 8–9.) Dinan alleges that it identified

1 a company, Legacy Healthcare (the “Prospect”), as a potential acquisition target for  
 2 Deaconess in August of 2014. (*Id.* 4–5 ¶¶ 10–11.) According to Dinan, Deaconess  
 3 acquired the Prospect sometime in November of 2018 (the “Transaction”). (*Id.* at 6 ¶ 22.)  
 4 Consequently, Dinan claims that it is entitled to its contingency fee. (*Id.* ¶¶ 22–24.)

5 During their business relationship, Deaconess attended a one-time business meeting  
 6 with Dinan in Phoenix, (Doc. 17 at 4), though this meeting was not Deaconess’ only or  
 7 initial reason for being in Arizona, (Doc 17-1 at 15). The purpose of the meeting was to  
 8 see Dinan’s office and discuss potential “business sectors” in which Deaconess had  
 9 interest. (*Id.* at 13–15.)

10 Dinan is an Arizona limited liability company with its principal place of business in  
 11 Phoenix, Arizona. (Doc. 1-3 at 3.) Deaconess is an Ohio corporation, (*id.* at 4), and Ohio  
 12 is its “home state.” (Doc 16 at 11.) The Prospect is located in North Carolina. (*Id.* at 10;  
 13 *see* Doc 1-3 at 5.)

## 14 II. Legal Standard

15 Before trial, a defendant may move to dismiss the complaint for lack of personal  
 16 jurisdiction. *Data Disc, Inc. v. Sys. Tech. Assocs., Inc.*, 557 F.2d 1280, 1285 (9th Cir.  
 17 1977); Fed. R. Civ. P. 12(b)(2). Plaintiff bears the burden of establishing personal  
 18 jurisdiction, *Ziegler v. Indian River Cty.*, 64 F.3d 470, 473 (9th Cir. 1995), and “need only  
 19 make a prima facie showing of jurisdictional facts” “in the absence of an evidentiary  
 20 hearing,” *Sher v. Johnson*, 911 F.2d 1357, 1361 (9th Cir. 1990) (citation omitted). In  
 21 determining whether a plaintiff has established a prima facie case for personal jurisdiction  
 22 over a defendant, the complaint’s uncontroverted allegations are accepted as true and  
 23 “conflicts between the facts contained in the parties’ affidavits must be resolved in  
 24 [plaintiff’s] favor.” *Am. Tel. & Tel. Co. v. Compagnie Bruxelles Lambert*, 94 F.3d 586,  
 25 588 (9th Cir. 1996). Moreover, “the court may consider evidence outside the pleadings,  
 26 including affidavits and other materials submitted on the motion.” *SKAPA Holdings LLC*  
 27 *v. Seitz*, No. CV-20-00611-PHX-DJH, 2021 WL 672091, at \*2 (D. Ariz. Jan. 21, 2021),  
 28 *aff’d*, No. 21-15298, 2022 WL 94716 (9th Cir. Jan. 10, 2022) (quoting *Lindora, LLC v.*

1 *Isagenix Int'l, LLC*, 198 F. Supp. 3d 1127, 1135 (S.D. Cal. 2016)).<sup>1</sup>

2 “When no federal statute governs personal jurisdiction, the district court applies the  
3 law of the forum state.” *Freestream Aircraft (Bermuda) Ltd. v. Aero Law Grp.*, 905 F.3d  
4 597, 602 (9th Cir. 2018). Arizona exerts personal jurisdiction to the “maximum extent  
5 permitted by the Arizona Constitution and the United States Constitution.” Ariz. R. Civ.  
6 P. 4.2(a); *see, e.g., A. Uberti and C. v. Leonardo*, 892 P.2d 1354, 1358 (Ariz. 1995). Thus,  
7 analyzing personal jurisdiction under Arizona law and federal due process are identical.  
8 *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800–01 (9th Cir. 2004).

9 To comport with due process, “[a]lthough a nonresident’s physical presence within  
10 the territorial jurisdiction of the court is not required, the nonresident generally must have  
11 certain minimum contacts . . . such that the maintenance of the suit does not offend  
12 traditional notions of fair play and substantial justice.” *Walden v. Fiore*, 571 U.S. 277, 283  
13 (2014) (internal quotation marks and citations omitted). This requirement ensures “that a  
14 defendant be haled into court in a forum State based on his own affiliation with the State,  
15 not based on the ‘random, fortuitous, or attenuated’ contacts he makes by interacting with  
16 other persons affiliated with the State.” *Id.* at 286 (quoting *Burger King Corp. v.*  
17 *Rudzewicz*, 471 U.S. 462, 475 (1985)). “Depending on the strength of those contacts, there  
18 are two forms that personal jurisdiction may take: general and specific.” *Picot v. Weston*,

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19 <sup>1</sup> The parties dispute what is the appropriate standard for a Rule 12(b)(2) motion and,  
20 consequently, what evidence the Court may consider for such a motion. (*See* Doc. 17 at  
21 5–7; Doc. 18 at 2–3.) Dinan is correct that the question is not whether the pleadings were  
22 sufficient but whether relevant facts exist to support jurisdiction. *See Cheatham v. ADT*  
23 *Corp.*, 161 F. Supp. 3d 815, 823 (D. Ariz. 2016) (“To withstand a 12(b)(2) motion, the  
24 plaintiff must show that the defendant is properly subject to the court’s jurisdiction. The  
25 plaintiff must make only a prima facie showing of jurisdictional facts when the defendant’s  
26 motion is based on written materials rather than an evidentiary hearing.” (internal citation  
27 omitted)). Similarly, Dinan is correct that, to the extent Deaconess possessed facts cutting  
28 against personal jurisdiction, Deaconess should have submitted those facts in its initial  
MTD. *See Sunburst Mins., LLC v. Emerald Copper Corp.*, 300 F. Supp. 3d 1056, 1060  
(D. Ariz. 2018) (“[T]he rule against introducing new facts on reply is not a new one in this  
district or in the Ninth Circuit.”). Therefore, the Court will not consider facts that only find  
their basis in the Second Declaration of John Murta, which was attached for the first time  
in Deaconess’ Reply. (*See* Doc. 18-1.)

1 780 F.3d 1206, 1211 (9th Cir. 2015) (citation omitted); *Cybersell, Inc. v. Cybersell, Inc.*,  
 2 130 F.3d 414, 416 (9th Cir. 1997). Here, Plaintiff only argues that the Court has specific  
 3 personal jurisdiction over Deaconess. (Doc. 17 at 8.).

4 “When a plaintiff relies on specific jurisdiction, he must establish that jurisdiction  
 5 is proper for ‘each claim asserted against a defendant.’” *Picot*, 780 F.3d at 1211 (quoting  
 6 *Action Embroidery Corp. v. Atlantic Embroidery, Inc.*, 368 F.3d 1174, 1180 (9th Cir.  
 7 2004)). “In order for a court to exercise specific jurisdiction over a claim, there must be  
 8 an ‘affiliation between the forum and the underlying controversy, principally, [an] activity  
 9 or an occurrence that takes place in the forum state.’” *Bristol-Myers Squibb Co. v. Superior*  
 10 *Court of Cal.*, 137 S.Ct. 1773, 1781 (2017) (quoting *Goodyear Dunlop Tires Operations,*  
 11 *S.A. v. Brown*, 564 U.S. 915, 919 (2011)). Without such a connection, “specific jurisdiction  
 12 is lacking regardless of the extent of a defendant’s unconnected activities in the State.”  
 13 *Bristol-Myers Squibb*, 137 S.Ct. at 1781. “Only contacts occurring prior to the event  
 14 causing the litigation . . . may be considered by the Court.” *Ariz. Sch. Risk Retention Trust,*  
 15 *Inc. v. NMTC, Inc.*, 169 F. Supp. 3d 931, 935 (D. Ariz. 2016) (citing *Farmers Ins. Exchange*  
 16 *v. Portage La Prairie Mut. Ins. Co.*, 907 F.2d 911, 913 (9th Cir. 1990)).

17 In analyzing specific jurisdiction, courts use the three-prong minimum contacts test  
 18 as a guide “to determine whether a defendant has sufficient contacts with the forum to  
 19 warrant the court’s exercise of jurisdiction[.]” *Freestream*, 905 F.3d at 603. The test  
 20 requires that:

21 (1) The non-resident defendant must purposefully direct his activities or  
 22 consummate some transaction with the forum or resident thereof; or perform  
 23 some act by which he purposefully avails himself of the privilege of  
 24 conducting activities in the forum, thereby invoking the benefits and  
 protections of its laws;

25 (2) the claim must be one which arises out of or relates to the defendant’s  
 26 forum-related activities; and

27 (3) the exercise of jurisdiction must comport with fair play and substantial  
 28 justice, i.e., it must be reasonable.

1 *Id.* (citation omitted); *see also Picot*, 780 F.3d at 1211. “The plaintiff has the burden of  
 2 proving the first two prongs.” *Picot*, 780 F.3d at 1211 (citation omitted). “If the plaintiff  
 3 succeeds in satisfying [them], the burden then shifts to the defendant to ‘present a  
 4 compelling case’ that the exercise of jurisdiction would not be reasonable.”  
 5 *Schwarzenegger*, 374 F.3d at 802 (quoting *Burger King*, 471 U.S. at 476–78). Absent a  
 6 “compelling case” that exercising jurisdiction would be unreasonable, it is presumed  
 7 reasonable. *Burger King*, 471 U.S. at 477. If a plaintiff fails to meet the first prong, the  
 8 Court need not address the others. *Ariz. Sch. Risk Retention Trust*, 169 F. Supp. 3d at 936.

### 9 **III. Discussion**

10 Deaconess argues that the case should be dismissed for lack of personal jurisdiction  
 11 under Fed. R. Civ. P. 12(b)(2). (*See generally* Doc. 15.) Dinan opposes the MTD but  
 12 argues, in the alternative, that the case should be transferred to the Southern District of  
 13 Ohio, (*see generally* Doc. 17), which is Deaconess’ “home state,” (Doc. 16 at 11).  
 14 Deaconess maintains that dismissal is appropriate but avers that it “would not oppose  
 15 transfer to, or jurisdiction in, the Southern District of Ohio.” (Doc. 18 at 11.) The Court  
 16 is persuaded that transfer to the Southern District of Ohio is appropriate here.

#### 17 **a. Lack of Specific Personal Jurisdiction**

18 Under the first prong of the specific jurisdiction test, Plaintiff must show that  
 19 Deaconess “either (1) ‘purposefully availed’ [itself] of the privilege of conducting activities  
 20 in the forum, or (2) ‘purposefully directed’ [its] activities toward the forum.” *Pebble Beach*  
 21 *Co. v. Caddy*, 453 F.3d 1151, 1155 (9th Cir. 2006) (citing *Schwarzenegger*, 374 F.3d at  
 22 802). This prong presents two distinct standards, with each to be applied under different  
 23 circumstances. *Schwarzenegger*, 374 F.3d at 802; *see Ziegler*, 64 F.3d at 473 (explaining  
 24 that courts apply the first prong differently to contract cases versus tort cases). In this  
 25 Circuit, “[a] purposeful availment analysis is most often used in suits sounding in contract,”  
 26 *Schwarzenegger*, 374 F.3d at 802, and the parties here advance arguments under that  
 27 analysis. (*See* Doc. 16 at 5–8; Doc. 17 at 8–17; Doc. 18 at –9.) The Court agrees that this  
 28 is the correct analysis.

1 Purposeful availment requires the defendant to “purposefully avail[ ] itself of the  
2 privilege of conducting activities within the forum state, thus invoking the benefits and  
3 protections of its laws.” *Schwarzenegger*, 374 F.3d at 802 (quoting *Hanson v. Denckla*,  
4 357 U.S. 235, 253 (1958)). That a non-resident defendant has a contract with a resident of  
5 the forum state does not suffice on its own to confer personal jurisdiction. *Gray & Co. v.*  
6 *Firstenberg Mach. Co.*, 913 F.2d 758, 760 (9th Cir. 1990) (citing *Burger King*, 471 U.S. at  
7 478); see *Roth v. Garcia Marquez*, 942 F.2d 617, 621 (9th Cir. 1991) (same). In contract  
8 cases, specific jurisdiction hinges on considerations such as: (1) prior negotiations, (2)  
9 contemplated future consequences, (3) the terms of the contract, and (4) the parties' course  
10 of dealing. *Gray*, 913 F.2d at 760 (quoting *Burger King*, 471 U.S. at 479).

11 Here, Dinan contends that Deaconess has purposely availed itself of doing business  
12 in Arizona by a number of activities, including the “ongoing, long-term nature” of the  
13 parties’ contractual relationship; Dinan’s location in, and work done from, Arizona; the  
14 “high volume” of phone calls and emails that the parties exchanged; the fact that Deaconess  
15 mailed payments to Dinan in Arizona; and a Deaconess agent’s attendance of a meeting  
16 with Dinan on December 3, 2014, in Phoenix, Arizona. (Doc. 17 at 13–14.) Deaconess  
17 contends that all these activities “boil[] down to one fact—Dinan happens to be located in  
18 Arizona.” (Doc. 18 at 1.) It argues that this fact is insufficient to confer personal  
19 jurisdiction. (*Id.*) While the Court finds that Dinan’s argument is *slightly* more colorable  
20 than Deaconess allows, it agrees that Deaconess has not purposefully availed itself of the  
21 benefits and protection of Arizona.

22 As an initial matter, some of the facts relied on by Dinan are not purposeful activities  
23 that invoke the protections and benefits of the forum. For instance, the email and phone  
24 communications between the parties, as well as Deaconess’ mailing of checks, are not the  
25 sort of activities that constitute purposeful availment in the Ninth Circuit. See *Peterson v.*  
26 *Kennedy*, 771 F.2d 1244, 1262 (9th Cir. 1985) (explaining that, in the Ninth Circuit,  
27 “ordinarily ‘use of the mails, telephone, or other international communications simply do  
28 not qualify as purposeful activity invoking the benefits and protection of the [forum]



1 state.” (quoting *Thomas. P. Gonzalez Corp. v. Consejo Nacional de Produccion de Costa*  
 2 *Rica*, 614 F.2d 1247, 1254 (9th Cir. 1980))). Additionally, Dinan’s location in Arizona, or  
 3 that fact that its work was done from Arizona, are irrelevant for the purposeful availment  
 4 analysis because these are action taken by Dinan, not Deaconess. *Joseph Saveri L. Firm,*  
 5 *Inc. v. Criden*, 696 F. App’x 189, 191 (9th Cir. 2017) (“[T]here must be actions by the  
 6 defendant himself that create a substantial connection with the forum State.” (quoting  
 7 *Burger King*, 471 U.S. at 475) (emphasis added) (internal quotation marks removed)).

8 The remaining facts—the one-time business meeting and the existence of a  
 9 contractual relationship—do not suffice to establish purposeful availment. “As the  
 10 Supreme Court has expressly cautioned, a contract alone does not automatically establish  
 11 minimum contacts in the plaintiff’s home forum.” *Boschetto v. Hansing*, 539 F.3d 1011,  
 12 1017 (9th Cir. 2008). The facts here contain more than a contract *alone*, but not by much;  
 13 the only other relevant fact is a business meeting in Phoenix. By Dinan’s own admission  
 14 and evidence, the December 2014 meeting was spur-of-the moment, unrelated to  
 15 negotiating the Agreement (which was entered seven months earlier), and a one-time  
 16 occurrence. (See Doc. 17 at 4–5; Doc 17-1 at 11–15.) This is the sort of “temporary  
 17 physical presence” that is not sufficient to overcome Deaconess’ overall lack of business  
 18 activities within the forum state. See *Fed. Deposit Ins. Corp. v. Brit.-Am. Ins. Co.*, 828  
 19 F.2d 1439, 1443 (9th Cir. 1987).

20 Moreover, the terms of the Agreement do not support a finding of personal  
 21 jurisdiction. The contract does not contain a choice-of-law or forum-selection clause,  
 22 makes no mention of contemplated future consequences<sup>2</sup> in Arizona, and does not even  
 23 contain the word “Arizona.” (See Doc. 17-1 at 8–9.) The absence of such terms is telling.  
 24 See, e.g., *Roth v. Garcia Marquez*, 942 F.2d 617, 622 (9th Cir. 1991) (explaining that—in  
 25 “a very close call” scenario—the “future consequences” of a contract lead the court to find  
 26 personal jurisdiction); *Hill-Rom Servs. Inc. v. Convergence Sys. Ltd.*, No. CV-19-02223-

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27  
 28 <sup>2</sup> Notably, Dinan does not say how many, if any, of the 1,700 prospects that it presented to  
 Deaconess were located in Arizona.

1 PHX-GMS, 2019 WL 5684198, at \*4 (D. Ariz. Nov. 1, 2019) (explaining that “the choice  
2 of law and venue provisions [were] relevant factors” in the Court’s finding of personal  
3 jurisdiction).

4 In summary, an Ohio company (Deaconess) contracted with an Arizona company  
5 (Dinan), who provided a North Carolina business (the Prospect) as a potential acquisition.  
6 The Agreement between the Ohio and Arizona company was negotiated from their  
7 respective states, with neither traveling to the other. An Ohio company agent made a one-  
8 time, impromptu stop in Phoenix to have a business meeting with the Arizona company—  
9 which neither involved finalizing the Agreement, nor the acquisition of the Prospect that  
10 is the subject of this litigation. Other than that, the only Arizona related activities were  
11 those undertaken by the Arizona company during its contractual relationship with the Ohio  
12 company. These connections are far too attenuated to say that the Ohio company has  
13 purposefully availed itself of the protections and benefits of the forum state.

14 Accordingly, Deaconess has not purposefully availed itself of the forum, and the  
15 Court need not consider the remaining prongs of the personal jurisdiction analysis.  
16 Therefore, the Court finds that it does not have personal jurisdiction over Deaconess.

#### 17 **b. Appropriateness of Transfer**

18 Dinan moves that the Court transfer the action to the Southern District of Ohio—  
19 instead of dismissing the case—if the Court finds it is without personal jurisdiction over  
20 Deaconess. (Doc. 17 at 17.) Deaconess neither opposes the transfer, nor will it challenge  
21 the jurisdiction of the Southern District of Ohio. (Doc. 18 at 11.) The Court agrees that,  
22 given its lack of personal jurisdiction, transfer to the Southern District of Ohio is  
23 appropriate.

24 28 U.S.C.A. § 1631 provides that, if a district court “finds that there is a want of  
25 jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal  
26 to any other such court . . . in which the action or appeal could have been brought at the  
27 time it was filed.” That Deaconess’ MTD did not request transfer is irrelevant. *See Cruz-*  
28 *Aguilera v. I.N.S.*, 245 F.3d 1070, 1074 (9th Cir. 2001) (“Because the statute's language is



1 mandatory, federal courts should consider transfer without motion by the parties.”).  
2 Transfer is appropriate if: “(1) the transferring court lacks jurisdiction; (2) the transferee  
3 court could have exercised jurisdiction at the time the action was filed; and (3) the transfer  
4 is in the interest of justice.” *Id.*

5 All three prongs of the test are met here. First, the Court has found that it is without  
6 personal jurisdiction over Deaconess. Second, this action could have originally been  
7 brought in the Southern District to Ohio because it is the state in which Deaconess resides,  
8 and the suit is between diverse parties with an amount in controversy that is greater than  
9 \$75,0000. *See* 28 U.S.C.A. § 1332. Third, transfer is in the interest of justice because it  
10 would prevent unnecessary delay by requiring Dinan to refile this action in the Southern  
11 District of Ohio. (“Normally transfer will be in the interest of justice because normally  
12 dismissal of an action that could be brought elsewhere is time consuming and justice-  
13 defeating.” *See id.* (quoting *Miller v. Hambrick*, 905 F.2d 259, 262 (9th Cir. 1990) (internal  
14 quotation marks omitted)). Therefore, the Court will transfer this action.

#### 15 IV. Conclusion

16 Therefore,

17 **IT IS ORDERED** denying Deaconess’ MTD. (Doc. 15.)

18 **IT IS FURTHER ORDERED** transferring this case to the Southern District of  
19 Ohio.

20 **IT IS FURTHER ORDERED** instructing the Clerk to terminate this case.

21 Dated this 8th day of February, 2022.

22  
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24   
25 Honorable Susan M. Brnovich  
United States District Judge  
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28